

JAN 19 2006**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS****NOT FOR PUBLICATION****UNITED STATES COURT OF APPEALS****FOR THE NINTH CIRCUIT****UNITED STATES OF AMERICA,****Plaintiff - Appellee,****v.****LARRY ALLEN POWELL,****Defendant - Appellant.****No. 04-35667****D.C. Nos. CV-03-00301-EFS
CR-02-00055-EFS****MEMORANDUM***

**Appeal from the United States District Court
for the Eastern District of Washington
Edward F. Shea, District Judge, Presiding**

Submitted January 9, 2006**

Before: HUG, O'SCANNLAIN, and SILVERMAN, Circuit Judges.

**Larry Allen Powell appeals pro se from the district court's denial of his 28
U.S.C. § 2255 motion seeking to vacate his 41-month sentence for being a felon in**

*** This disposition is not appropriate for publication and may not be
cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.**

**** This panel unanimously finds this case suitable for decision without
oral argument. See Fed. R. App. P. 34(a)(2).**

possession of ammunition. We have jurisdiction under 28 U.S.C. § 2253, and we vacate and remand.

Powell contends, and the government concedes, that the district court erred at sentencing by using U.S.S.G § 4A1.3 to increase Powell's offense level. We agree. *See United States v. Martin*, 278 F.3d 988, 1002-03 (9th Cir. 2002) (“[o]ffense-level departures to reflect an underrepresented criminal history are erroneous”). We therefore vacate the district court's judgment and remand for the district court to grant the § 2255 motion and resentence Powell.

To the extent that Powell's brief raises uncertified issues, we construe his contentions as a motion to expand the Certificate of Appealability, and we deny the motion. *See* 9th Cir. R. 22-1(e); *Hiivala v. Wood*, 195 F.3d 1098, 1104-05 (9th Cir. 1999) (per curiam).

VACATED and REMANDED.